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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 685

ALTHEA G. WILLIAMS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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to the United States Court of Appeals for the Ninth Circuit.

JUDGMENT SOUGHT TO BE REVIEWED.

Petitioner Althea G. Williams respectfully petitions for a writ of certiorari to review the judgment against her in the United States Court of Appeals for the Ninth Circuit, a copy of which is appended. Said judgment affirmed the judgment of the United States District Court, Northern District, Southern Division, reported in 141 F. Supp. 851, which proceeding was had pursuant to the mandate of the United States Supreme Court, reported in 350 U.S. 857. Prior proceedings in this case before the District Court and the Court of Appeals are reported at 105 F. Supp. 208 and 215 F.2d 800, respectively.

JURISDICTIONAL STATEMENT.

The judgment sought to be reviewed was entered on September 26, 1957. No rehearing was requested, nor was any extension of time sought within which to petition for certiorari.

Jurisdiction to review the judgment in question is conferred upon this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the Court of Appeals disregarded the express mandate of the Supreme Court of the United States that California law must be applied in determining the employer's liability in this case.

2. Whether, as the Court of Appeals held, official army regulations are to be regarded as a substantive body of law which will be controlling on questions of substantive law, or whether, as petitioner contends, the law of California must control all substantive issues of this case, including the effect to be given to said army regulations.

3. Whether the law of California requires that such regulations be considered superseded as a delineation of authority when there is clear proof that the employer-principal had knowledge of and acquiesced in consistent violation of such regulations.

4. Whether the Court of Appeals ignored the law of the circuit and the doctrine of *stare decisis* in disregarding the facts, reasoning, principle, and holding of *Murphey v. U. S.*, 179 F.2d 743 (9th Cir. 1950).

5. Whether, under the circumstances presented by this case, recreation or entertainment is not a proper purpose and interest of the employer.

6. Whether a soldier who is put in possession of an army vehicle for the purpose of obtaining recreation and entertainment and who injures a bystander while pursuing that objective is acting within the scope of his employment, under accepted principles of *respondeat superior* as applied by the Courts in general and by California Courts in particular.

7. Whether the Court of Appeals gave an unduly restrictive and unintended interpretation and application of the Federal Tort Claims Act.

STATUTES INVOLVED.

Sections 1346 (b), 2674 and 2671 of Title 28 U.S.C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 982, 983) provide in pertinent part:

Section 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the

law of the place where the act or omission occurred.

* * * * *

Section 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

Section 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

* * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

STATEMENT OF THE CASE.

This action was brought by petitioner in the District Court of the United States, Northern District, Southern Division, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671, *et seq.*

In the evening of March 3, 1949 at about 10:30 o'clock P.M., petitioner plaintiff was sitting in a vehicle parked near a beach area on the Island of Guam, when an army vehicle driven by Corporal Joe Seabourn of the United States Army crashed into the side of her car. (R. 58-60).[1] Petitioner was seriously and permanently injured (R. 35-36, 39-40). Petitioner filed suit, contending that the soldier was acting within the scope of his employment at the time of the accident (R. 1).

The evidence on the issue of scope of employment consisted entirely of written interrogatories and documentary evidence. The following facts were disclosed.

Soldiers stationed on Guam technically were on duty 24 hours per day (R. 30). At the time of the accident, Seabourn was a supply clerk stationed on Guam with a service detachment (R. 27). In the performance of his duties, he occasionally drove an army weapons carrier (R. 27). On March 3, 1949, he had been issued an army operator's permit for any vehicle up to 2½ tons (R. 27).

About 8:00 A.M. on the day of the collision, Seabourn, while on pass (R. 27), and two other soldier buddies, also on pass—Sgt. Vincent and Pfc. Schmidt—went to a tavern about a mile from Harmon Field and spent most of the morning drinking (R. 132). In the afternoon, the three hired a cab and went about Agana, drinking, until 6:30 P.M. when they returned to the base (R. 132).

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[1]References to the record will be to Volume 1 of the record, unless otherwise designated.

At 8:00 P.M. Seabourn went to Sgt. Stiles of his company and obtained an official "trip ticket" for a ¾ ton weapons carrier assigned to the 374th T.C.W. (R. 129, 28). The trip ticket was good for that vehicle until 9:30 A.M. the next day. (It was made out to Pfc. Carbera) (R. 28).

Seabourn and his companion, Pfc. Richard Schmidt, both testified that trip tickets in service stock always were passed around between the men working in that section regardless of the name of the individual to whom the trip ticket was made out (R. 126). This was the usual procedure (R. 127); and it applied whether the vehicle was to be used for work or recreation. Vehicles were necessary for recreational purposes in view of the distances on Guam between station points and recreational facilities (R. 127). All officers and enlisted men in Seabourn's unit followed the practice of thus circulating trip tickets (R. 131).

Seabourn's superior officers had jeeps and the enlisted men used weapons carriers, as Seabourn did on the night of the collision (R. 131).

The practice had prevailed on Guam for at least fifteen months prior to the accident (R. 130).

Having obtained the official trip ticket authorization at 8:00 P.M. on the day in question, the proper army authorities at the motor pool gave Seabourn the weapons carrier (R. 128). After this, he and his two companions, driving the vehicle, checked out of the base in the usual manner and went to the official Army NCO Recreational Club and to Agana (R. 128). Neither Schmidt nor Vincent drove the carrier. They left Seabourn before the collision (R. 132).

The District Court for the Northern District of California Southern Division, found that petitioner suffered severe bodily injuries as a result of the accident; that the accident was entirely due to the negligence of the soldier; that the soldier was, at the time of the accident, off duty; that the soldier had obtained unauthorized possession of the vehicle; that the soldier's use of the vehicle was not for a purpose authorized by his commanding officer; that the soldier was merely off on a frolic of his own; and the Court concluded that the soldier, an employee of respondent, was not acting within the course and scope of his employment (R. 50).

On October 22, 1952, judgment was entered for respondent. On November 21, 1952, petitioner filed her Notice of Appeal (R. 53). On September 8, 1954 the Court of Appeals for the Ninth Circuit filed its opinion, affirming the judgment below (R. 168). The United States Supreme Court granted certiorari and vacated the judgment of the Court of Appeals, remanding the cause to the District Court for reconsideration in the light of the properly governing principle, the California doctrine of *respondeat superior* (V. II, p. 1). The case was then further "considered" by the District Court on the original trial record, the aforementioned findings being reaffirmed, and on July 12, 1956, judgment was again entered in favor of respondent (V. II, p. 15). Petitioner filed a Notice of Appeal on August 27, 1956 (V. II, p. 17). On September 26, 1957, the Court of Appeals for the Ninth Circuit filed a second opinion, again affirming the judgment below (V. III, p. 27). In an attempt

to secure a just and proper adjudication of her case, petitioner is once again obliged to seek review in this Court.

I. THE LOWER COURT IGNORED AND DISOBEYED THE EXPRESS TERMS OF THE MANDATE OF THE SUPREME COURT OF THE UNITED STATES IN PERMITTING PROHIBITIVE ARMY REGULATIONS TO CONTROL ITS DECISION HEREIN AND IN FAILING TO APPLY THE RELEVANT AND PROPERLY APPLICABLE CALIFORNIA LAW, WHICH DICTATES THAT THESE REGULATIONS BE DISREGARDED AND THAT A JUDGMENT BE ENTERED FOR PLAINTIFF.

The vital premise underlying the decision of the Court below is that Seabourn's possession of the vehicle was not authorized. The Court reached that premise by a finding that the army regulations pertaining to use of army vehicles had not been complied with. Hence, it was reasoned, Seabourn's possession of this army vehicle was not authorized. Thus at those pages of its opinion set out in the Record, V. III, pp. 17, 19, 20, and 21,[2] the Court of Appeals details its exclusive reliance on these army regulations. The substance of its ruling is contained in the following excerpts (V. III, pp. 19-20):

> Thus appellant asserts that there was a "broadened authorization" for Seabourn's use of the vehicle for his night ride recreation. But the truth is that no such "broadened authorization" can be found in any language in the Army Regulations; in fact, appellant is compelled, not only to completely repudiate these regulations, but also to justify a loose practice of flouting them . . .

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[2]Citations to the opinion of the Court of Appeals in the present case will be made to Volume III, pp. 3-26 of the record herein.

The short of it is that the alchemy of legal argument cannot transmute a clear violation of applicable and controlling regulations by servicemen into a principle of law which we must arbitrarily and artificially apply to create government liability.

A. The choice of law principle utilized by the Court below in passing on the question of authorization is not only incorrect, but is in disobedience to the mandate of this Court.

The mandate of the Supreme Court of the United States in this case reads as follows (V. II, p. 1):

> This case is controlled by the California doctrine of repondeat superior. The judgment is vacated and the case remanded for consideration in the light of that governing principle.

This mandate was phrased in clear and unmistakable terms. It ordered that the substantive issues of the case be determined by California law. Yet in deciding the crucial issue whether Seabourn's conduct was *authorized*, the Court of Appeals abandoned any reference to California law and relied exclusively upon army law, *viz.*, the army regulations. See those portions of the opinion cited, *supra*, p. 8, and the text of the opinion in general. This action of the Court of Appeals cannot be supported in face of the definite mandate given by the highest Court of the land.

In addition, this choice of law was manifestly improper. The Federal Tort Claims Act, 28 U.S.C. 1346(b), 62 Stat. 933 provides in pertinent part (italics added):

> (b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have ex-

> clusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*

Both the Government and the Court of Appeals concede that the applicable state law is the law of California. Thus, the Court of Appeals stated at the outset of its opinion (V. III, p. 15):

> In light of the fact situation we have discussed, the problem to be resolved is the application of the California doctrine of respondeat superior so far as several pertinent decisions reveal it.

No explanation is given for why the Court of Appeals felt it necessary to depart from this concededly applicable California law in discussing the issue of authorization. Nor is any valid justification available. *The law of California, and not the law of the army regulations, is controlling on the issue of authorization,* just as it is controlling of the other substantive issues of the case.

The Court below erred in ignoring the mandate of the Supreme Court and applying an inapplicable rule of law. Moreover, it has set a dangerous precedent which may well have far-reaching consequences if not corrected. For there are a vast number of official army

regulations, covering practically every army activity and every phase of army life. The same is true of every branch of the executive arm. If this vast array of regulations is now to be given precedence over state statutes and case law in deciding questions under the Tort Claims Act and other questions of substantive law, such an extraordinary rule of law should certainly receive express sanction in an opinion of this Court. If on the other hand, and as appellant certainly contends, such a rule flouts the express intent of the Tort Claims Act, a decisive repudiation of the decision of the Court below will save much confusion and injustice in the years to come.

B. Under the applicable California law, it is clear that violation of the employer's rules and regulations does not control the determination whether an act was authorized or unauthorized. On the contrary, where as here there is clear knowledge of, and acquiescence by the employer in the violation, authorization does exist.

Petitioner does not contend that the army regulations involved here are to be ignored. Rather, she contends that the effect of the regulations should be determined by California law, and not regarded as a governing law themselves. The counterpart of these army regulations in civilian life would be company rules. Thus the effect of these army regulations must be governed by the California case law dealing with the rules, regulations, and orders promulgated by a private employer.

The Federal Tort Claims Act contemplates that such counterparts shall be used in determining government liability. Section 1346(b) of that Act, *supra*,

provides that liability will attach "under circumstances where the United States, if a private person, would be liable to the claimant. . . ." Section 2674 of the Act provides as follows:

> The United States shall be liable respecting the provisions of this title relating to tort claims in the same manner and to the same extent as a private individual under like circumstances . . .

See also, *Indian Towing Company v. United States*, 350 U.S. 61, 76 S.Ct. 122.

The facts of this case in respect to whether or not possession of the vehicle was authorized are not in dispute. There is the official army regulation prescribing certain formalities and procedures that are to be used in obtaining a vehicle. There is undisputed evidence of a widespread practice on the army post at Guam of at least fifteen months standing by which possession of vehicles was obtained without the use of the prescribed formalities (R. 126, 127, 130, 131). This practice was not only known to, but utilized by, the officers at the post, including Corporal Seabourn's own commanding officer (R. 131). It was by means of this practice that Corporal Seabourn obtained possession of the vehicle involved here.

In face of these facts the Government and the Court below have insisted on regarding Corporal Seabourn as a thief. Petitioner maintains however that the foregoing facts as a matter of law place Corporal Seabourn in an entirely different position. He is not a surreptitious taker. Rather he obtained the vehicle openly, in accordance with the prevailing method and

procedure. California law and Agency law in general dictate a different result on the foregoing facts.

It is of course true that the employer may place limitations on authority of his employees. Regulations or company rules often serve the function of such limitations. But express orders or limitations can also be countermanded. Thus in *Casey v. Fortune,* 78 C.A.2d 922, 179 P.2d 99, the chief issue was whether or not Robert Fortune had authority to drive his mother's car, and the testimony showed that he had been expressly forbidden its use. However, the prohibitive order was followed by conduct that negatived its effect. The California District Court of Appeal ruled that authority to drive existed despite the formal express prohibition, observing as follows (p. 101):

> Although she said that she "didn't want" him to drive the automobile and she had told him the reason why she didn't want him to drive it, and although the circumstances with respect to his prior use of the automobile were such that she should have suspected that he had disobeyed her, she did nothing further on the night of the accident to prevent him from using the automobile On the contrary, she continued to keep the keys where they were easily obtainable by him, "in plain view" on the buffet where "We always keep our keys."

Although this case deals with liability under an owner's statute, it applies the universally accepted principle of *respondeat superior* cases, that knowledge and acquiescence are tantamount to express authori-

zation. It thus stands for the proposition that knowledge and acquiescence will be construed as a grant of authority, in spite of an order or regulation to the contrary. An excellent statement of this general principle is found in *Fry v. Southern Public Utilities Co.*, 183 N.C. 281, 111 S.E. 354, 358 (emphasis added):

> It has been held generally that if a rule is made for the safety of the servant or others, but its *customary violation* has continued so long that the master either knew of it, or could by the exercise of ordinary care have found it out, and acquiesced in it, *he is presumed to have consented to its repeal, or to have waived obedience to it.*

In the California case of *Andrews v. Scidner*, 49 C.A. 2d 427, 430, 121 P.2d 863, 864, the Court said as follows:

> Responsibility of the principal results from acts so committed even though they be contrary to the principal's explicit instructions or otherwise unauthorized, or malicious or wilful.

The California Civil Code deals expressly with this situation in § 2316:

> Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care allows the agent to believe himself to possess.

And in determining whether a particular act is reasonably contemplated by the employment, "the custom and usage of a particular employment . . . should be considered." *Employers' Etc. Corp. v. Indus. Acc. Com.*, 37 C.A.2d 567, 573, 99 P.2d 1089, 1092.

The federal courts likewise recognize and apply this principle. In *Murphey v. U. S.*, 179 F.2d 743 (9th cir. 1950), the government was held liable although the driver of the vehicle disobeyed explicit instructions about where he might use the vehicle, inasmuch as "the employing government, through Brander's superior officers, knew that 'as incidental acts' the truck was employed to reach places of entertainment even short distances outside Klamath." (p. 746). And in *U. S. v. Taylor*, 236 F.2d 649 (6th cir. 1956), the majority and dissenting opinions *both* agreed as follows on the principle in question here:

> "The fact that the Air Force personnel were acting in disobedience of their orders would not alone exculpate the government from liability under the law of Tennessee. (Majority at p. 654)"
>
> Under Tennessee law, as well as the law generally, the mere fact that an employee is acting in disobedience of orders or instructions given him by his employer does not preclude a finding that he was acting within the scope of his employment. (Dissent at p. 655).

Indeed, any other rule would be vastly unjust. When a corporate employer promulgates a regulation restricting conduct, but that regulation is systematically disregarded, not only by the employees but also by the officers of that corporate employer, then that regulation can no longer be said to limit the authorization of the employees. In the present case, the fact that the short-cut procedure for obtaining army vehicles was of such long standing should of itself be sufficient to show that the employer knew of and acquiesced in that practice. Such knowledge and

acquiescence are conclusively shown here by the additional fact that the officers at the post *in fact* knew of the practice and even utilized it *themselves*. As a matter of law, these undisputed facts show conclusively that Corporal Seabourn's possession of the army vehicle in question was authorized. The validity of the decision of the Court of Appeals, being based on the opposite premise, is thus completely destroyed.

II. ALTHOUGH THIS CASE IS INDISTINGUISHABLE FROM THE RECENT CASE OF MURPHEY v. U.S., 179 F.2d 743 (9th Cir. 1950), WHICH REPRESENTS THE LAW OF THE NINTH CIRCUIT, THE COURT OF APPEALS FOR THAT CIRCUIT IGNORED THE PRINCIPLE OF STARE DECISIS AND REFUSED TO FOLLOW THE PRECEDENT OF THAT CASE. THE COURT OF APPEALS HAS MISINTERPRETED THE SOUND PRINCIPLES OF THE MURPHEY CASE, AND HAS INTRODUCED CONFUSION AND UNCERTAINTY INTO A VITALLY IMPORTANT AREA OF THE LAW.

In its opinion, the Court below observed as follows (V. III, pp. 22-23):

> [U]nder the evidence we cannot regard Seabourn's wild night drive as anything other than a senseless and irrational act wholly unconnected with, and not serving or benefiting any business of his employer. For us to reach any other conclusion would do violence to clearly established facts.

It might be true that any wildness or drunkenness involved in this night drive did not *per se* benefit the employer. But these particulars go merely to the manner or the mode in which the drive was made. It is a universally accepted rule that drunkenness or

wildness will not absolve the employer; that the doing of an authorized act in a wrongful or prohibited *manner* will not preclude liability from attaching under *respondeat superior.* Restatement of Agency, §§ 230, 229; *Fields v. Sanders,* 29 C.2d 834, 180 P.2d 684; *Haworth v. Elliott,* 67 C.A.2d 77, 153 P. 2d 804; *Hiroshima v. Pacific Gas & Electric Co.,* 18 C.A.2d 24, 63 P.2d 340. Rather "drunkenness on the part of the agent is an act of negligence for which his employer becomes liable, if the servant otherwise is acting within the scope of his employment." *Christian v. U. S.,* 184 F.2d 523, 525 (6th Cir. 1950).

The elements of wildness and drunkenness should thus be disregarded in determining the preliminary question of scope of employment. The crucial and underlying fact is the drive itself. And it is the position of petitioner and the holding of the Court in the *Murphey* case that the employer's purpose—improvement of morale—*was* served by such a drive; that driving for pleasure *was* contemplated by the employer as being in the best interests of his business; and therefore that such *driving was within the scope of employment.*

This is the substance of the recreation-morale theory as enunciated in the *Murphey* case. The reasoning of that case may be summarized as follows. Mental attitude or morale of servicemen has a demonstrable effect on their efficiency in their work. Morale is thus of vital concern to the army. Sports, movies, *and recreation of all kinds* are thus of direct benefit to the army, and are recognized as such by the army and deliberately made an integral part of army life. Par-

ticularly does this become crucial on isolated posts where normal contact with home, friends, and civilian life in general are more difficult to maintain. The more difficult the morale problem and the more inaccessible any public forms of entertainment, the more crucial it is to the army that recreation be made available. This pertains not only to group recreation which benefits the servicemen in groups, but also to individual recreation or entertainment which benefits the morale of a single soldier. The morale problem will of course vary with each situation and with each soldier, and the available means of meeting this problem will also vary. But where the problem becomes severe, as where the post is an isolated one, it is common and appropriate army business to make some attempt to combat it by authorizing and providing entertainment and recreation. It was in this context that the *Murphey* case held that a soldier from an isolated post who killed a pedestrian while drunkenly and recklessly driving an army vehicle to an Indian ceremonial in violation of specific orders was within the scope of his employment within the meaning of the phrase as used in the Federal Tort Claims Act.

This principle is not a novel one. The *Murphey* case itself cites the analogous case of seamen held to the monotony of the ship, where recreation is considered an essential element of the employment and so within the scope of employment. *Ellis v. American Hawaiian S. S. Co.*, 165 F.2d 999 (9th Cir. 1948); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 63 S.Ct. 930. These cases hold that the improvement of morale is there a direct and necessary responsibility of the employer,

and that the employee directly serves his employer while engaging in allowed recreation.

Similarly, the principle has been utilized by the Courts of California. While of necessity there is no California army employer to provide us with an exact precedent, the California Courts have developed the so-called "bunkhouse rule" in cases under the Workman's Compensation laws which involved these same elements of confinement and isolation and monotony. Where such conditions exist in private employment, the employer is held responsible for the off-duty activities as well as the regular working activities of his employee. The former, no less than the latter, are held to come within the scope of employment. See, *e.g.*, *Larson v. Industrial Accident Commission*, 193 Cal. 406, 224 Pac. 744; *State Compensation Insurance Fund v. I.A.C.*, 194 Cal. 28, 227 Pac. 168; *Truck Insurance Exchange v. I.A.C.*, 27 C.2d 813, 167 P.2d 705; *Employer's Liability Assurance Corp. v. I.A.C.*, 37 C.A.2d 567, 99 P.2d 1089.

In the California case of *Boynton v. McKales*, 139 C.A.2d 777, 294 P.2d 733, a salesman attended a salesmen's banquet, became intoxicated from liquor provided by the employer, and on the way home struck a pedestrian. He pleaded guilty to a violation of a criminal statute concerning driving while intoxicated. In a civil suit against the employer based solely on *respondeat superior*, the employer contended that "no recovery against it could be had on the basis of *respondeat superior* because when the accident happened Brooks, in driving home from the banquet he had attended, was as a matter of law not acting in the scope of his

employment, the evidence allegedly showing without conflict that said banquet was a social affair, attended by Brooks for his own pleasure without any direct or indirect compulsion from his employer . . ." (p 740). In addition, it was shown that the employee was at the time driving his own car, and not the car of his employer. The Court found, however, that despite the social or entertainment aspects of the banquet, it had as its general purpose the benefiting of the employer's interests, and so was within the scope of employment.

In the instant case, we have present the elements of isolation and monotony. There is the highest possible extreme of employer control. There is the severe problem of morale on the tiny and remote island of Guam. The principle utilized in the California bunkhouse cases, in the seaman's cases, and in the *Murphey* case clearly control here. The soldier's recreation and entertainment under the circumstances that existed here is the employer's business. The soldier is serving and benefiting the employer in the very act of engaging in authorized recreational activities. No one will dispute that driving a vehicle is one form of recreation or entertainment. Attending the official NCO club is another recognized form of recreation. Use of army vehicles for these purposes was the established practice on the Island of Guam. And Seabourn, as is demonstrated by a prior portion of this brief, did not steal the army vehicle for those purposes, but obtained it through the regular channels in the customary manner. Under such facts, it should be held as a matter of law that Seabourn was within the scope of his employment when the collision injuring your petitioner occurred.

But petitioner does not rely solely on the compelling nature of the facts in her case standing alone. The Court of Appeals for the Ninth Circuit has already decided a case in favor of the plaintiff on facts so similar to the facts of the case at bar that the two are indistinguishable. Petitioner cites the facts and holding of the *Murphey* case and invokes the rule of *stare decisis*. Viewed in any way the Court should choose, the facts of the *Murphey* case compel an identical holding in the present case. If the important principle of the *Murphey* case is to be overruled, then it should have been overruled expressly and openly by this Court of Appeals. If, as petitioner believes, the *Murphey* case is a correct and just expression of the law, then she is entitled to a judgment in her favor.

Both cases arise under the same sections of the Federal Tort Claims Act. Both cases hinge exclusively on an interpretation of "scope of employment." Both involve application of California substantive law. In the *Murphey* case, "Sergeant Brander was one of about twenty air corps soldiers encamped about three miles from the town of Klamath in the northern part of California. In order to keep up the morale of these encamped men, a truck was provided for nightly visits to Klamath for their 'entertainment, movies, etc.'" (p. 744). Similarly in the present case, Corporal Seaborn was stationed at the isolated post on Guam, and to aid in keeping up morale, vehicles were provided to the men from the post's motor pool. In the *Murphey* case, "Brander had authority to drive it [the truck] that night to Klamath for the purpose of transporting

'the rest of the boys stationed there into town for entertainment, movies, etc.' " (p. 745). In the present case, Seabourn secured authorized possession of an army vehicle for his own use by using the customary procedure. In both cases, the facts showed that the driver of the vehicle had been drinking. In both cases the driver had been freed from any official duties for the evening. In the *Murphey* case, the driver at first proceeded to an unnamed site in the town of Klamath, at which point he was supposed to leave the truck until ready to return to the base. Instead, however, he proceeded on his own to the location of an Indian ceremonial. This fact was considered overridden by the fact that "the employing government, through Brander's superior officers, knew that 'as incidental acts' the truck was employed to reach places of entertainment even short distances outside Klamath." (p. 746). In the present case, Corporal Seabourn at first proceeded to the island NCO Club. From there, he proceeded to drive about the island. The undisputed testimony shows that the employing government, through Seabourn's superior officers knew that the vehicles were frequently employed in this manner, and in fact, so used them themselves.

In every respect, then, the facts of the present case are on a par with the facts of the *Murphey* case, save in those instances where the facts of the present case are *more demanding* of relief. Thus in the present case the isolation and monotony and the corresponding morale problem were more acute than in the *Murphey* case. In the present case there were no lady-friend

passengers involved, as there were in the *Murphey* case. In the present case there is no indication that the driver of the vehicle "was not free to use it during the evening" as there was in the *Murphey* case. In both cases we have a morale problem, the delivery of an army vehicle into the hands of the driver for use in recreation and entertainment, the contemplation by the employer that the vehicle would be so used or knowledge and acquiescence of the employer in the manner of its use, and finally, the ensuing injury to an innocent bystander.

The Court below vainly attempts to distinguish the *Murphey* case by stating that specific official orders and a specified recreational activity were the crucial ingredients of that decision, implying that those ingredients are lacking here. The actual language of the *Murphey* case in this regard, however, is as follows (p. 745):

> He was authorized by his commanding officer to drive the truck for "pleasure" under "instruction." That officer testified Brander had authority to drive it that night to Klamath for the purpose of transporting "the rest of the boys stationed there into town for entertainment, movies, etc."

Just as Brander was authorized, so was Seabourn. It has been demonstrated that the practice employed by Seabourn was a custom of long standing, widely utilized by both the men and their officers. Indeed, the present case is stronger in this regard, for Seabourn was given possession of the vehicle for his own personal use, while Brander, according to the testi-

mony of the same officer quoted above, "was not free to use it during the evening" but was supposed to park it alongside a building. As for the "specific" nature of the recreational activity involved, the Court in the *Murphey* case said merely that "The 'movies, etc.' certainly would include the Indian ceremonial." (p. 746).

The real crux of the *Murphey* decision is given by the Court as follows (p. 746) (emphasis added):

> We think the *overriding purpose* in Brander's employment in the use of the truck in the town of Klamath is the improvement of morale of the soldiers in *seeking "entertainment."* The "movies, etc." certainly would include the Indian ceremonial. The government being liable as a private person in California, *it is liable where the truck was in use for the broad purpose for which it was employed by Brander,* even though he had instruction that he was not "free" to use it in a particular manner accomplishing that purpose.

So here, the overriding purpose of the government in furnishing Seabourn with use of the vehicle was the improvement of morale of the soldiers in seeking entertainment. This would certainly include driving for pleasure, especially on an island with the limited resources of Guam. The government should thus be liable where the vehicle was in use for the broad purpose for which it was employed by Seabourn.

The opinion of the Court of Appeals in the present case was written by Justice Bone, the same judge who wrote a dissenting opinion in the *Murphey* case.

In that dissenting opinion, Justice Bone correctly described the *Murphey* decision as follows (p. 747):

> The decision of the court appears to rest solely on the ground that recreation and pursuit of pleasure are, as a matter of law, a part of a soldier's duty and within the scope of his army employment.

To this description might be added the important limiting factor of isolation and monotony, and the resulting crucial morale problem. Justice Bone's dissenting opinion then characterized the facts of the *Murphey* case and took exception to the holding of that case as follows (p. 749):

> Sergeant Brander was, at the time of the accident, engaged in the pursuit of his own personal recreation and pleasure, and even though such pursuit would indirectly tend to contribute to the efficient performance of his duties by aiding his "morale," (and to that end was encouraged and authorized by his superior officer) such use of the army truck was not incidental to his employment and not within the scope of his employment within the permissible limits of the respondeat superior doctrine.

Petitioner submits that these quotations are careful and accurate descriptions of the facts and issues of the *Murphey* case. The above quotation is also an accurate description of the facts and the issues in the present case. In the *Murphey* case, the issue was resolved by the Court in favor of plaintiff by a ruling that "recreation and pursuit of pleasure are [under certain circumstances] as a matter of law a part of a soldier's duty and within the scope of his army

employment." Contrast with this the language of the Court in the present case (V. III, p. 22):

> This Court is not unmindful of the injury inflicted on appellant but under the evidence we cannot regard Seabourn's wild night drive as anything other than a senseless and irrational act wholly unconnected with, and not serving or benefiting any business of his employer.

It is obvious that the Court below has disregarded the just and well-considered principle of the *Murphey* case. The Court of Appeals erred in disregarding this principle and denying relief to your petitioners.

More than this, the Court of Appeals has obscured the law in an important field of litigation. As interpreted in the present case and limited by the holding of the present case, the *Murphey* case is dead. Such a result should not be accomplished by indirection. The bar and the bench would be much better served to have the *Murphey* case overruled than to have it thus emasculated. As matters now stand, we are faced with two directly inconsistent decisions on the important issue of a serviceman's scope of employment. This issue is vitally important, not only because of the frequency with which it is raised, but also because of the effect which it has on the crucial and oftentimes delicate matter of relations between the military and the civilian. Too much is at stake here to countenance any course which allows this issue to flounder in obscurity. For the sake of clarity in the handling of future claims and cases involving the military under the Federal Tort Claims Act, this Court should review the present case and settle once

and for all the wisdom of the principle of the *Murphey* case.

III. THIS COURT HAS ALREADY GRANTED CERTIORARI IN ANOTHER CASE IN WHICH THE SAME ISSUES AND THE SAME MATTERS OF POLICY ARE RAISED. JUSTICE WILL BEST BE SERVED AND THE LAW IN THIS FIELD WILL BEST BE DEVELOPED BY GRANTING CERTIORARI ALSO IN THE PRESENT CASE AND TREATING THE TWO AS COMPANION CASES.

Similar facts and similar problems to the ones involved here are crucial to the decision of *U. S. v. Taylor,* 236 F.2d 649 (6th Cir. 1956), cert. granted 352 U.S. 963, 77 S.Ct. 364, 1 L.Ed.2d 320. In that case, a plane had been entrusted to a pilot for the purpose of training maneuvers. According to the official regulations, these maneuvers were to be restricted to a certain area around the base, an area approximately 180 miles in diameter. In violation of these regulations, the pilot departed from the designated area and flew the plane to the pilot's home town, 300 miles distant from the base. At this point the pilot made two passes over the local courthouse, flying at low altitude and at excessive speed, which conduct was also in violation of official regulations. On the second of these passes, the plane crashed, resulting in injuries which gave rise to suit under the Federal Tort Claims Act. The district judge, sitting without a jury, entered judgment for plaintiffs, ruling that the pilot and crew were acting in the line of duty and within the general scope of employment. The government appealed to the Court of Appeals for the Sixth Circuit. That Court reversed the decision below by a two to one decision.

The basic and most important similarity between the *Taylor* case and the present case is that the Court of Appeals has given an unduly restrictive interpretation and application of the Federal Tort Claims Act. The liberal intent of that statute has been well expounded by the Supreme Court of the United States in such cases as *Rayonier Incorporated v. U. S.*, 352 U.S. 315, 77 S.Ct. 374; *Indian Towing Company v. U. S.*, 350 U.S. 61, 76 S.Ct. 122; *U. S. v. Yellow Cab Co.*, 340 U.S. 543, 71 S.Ct. 399. The decision in the *Taylor* case, as in the present case, is badly out of line with the desires of Congress and the rulings of this Court.

In addition, there is a similarity in subordinate issues in these two cases, a similarity which is revealed by the recitals in the *Taylor* opinions as to what are the crucial elements or ingredients which produce liability under the Act. There is also a close parallel in the facts involved in the two cases.

Both the majority and the dissenter in the *Taylor* case discounted the fact that army regulations had been disobeyed. The majority opinion stated as follows (p. 654):

> The fact that the Air Force personnel were acting in disobedience of their orders would not alone exculpate the government from liability under the law of Tennessee.

However, the majority emphasized the fact that a specific mission had been given to the pilot and that he had made a substantial departure from that mission. It was then held that he had abandoned the employer's business by so doing. His employment at

the moment was for "training," and his conduct "could not further the training purposes of the employer, but could only frustrate them." (p. 655).

The dissenting opinion likewise considered the violation of regulations to be of no significance.

> Under Tennessee law, as well as the law generally, the mere fact that an employee is acting in disobedience of orders or instructions given him by his employer does not preclude a finding that he was acting within the scope of his employment. The officers and crew of the airplane were duly authorized to take off and use the airplane on a training flight. (p. 655).

The dissenting judge considered the crucial facts to be as follows (p. 655):

> In the instant case, the negligent operators of the airplane were put in possession of the plane and were flying it in the line of their duty as trainees.

On the basis of these two factors, the dissenter ruled in favor of scope of employment and liability.

The parallel of the *Taylor* case with the present case is a close one. In both there exists a violation of official regulations. This violation was treated by the Court below in the present case as of controlling significance. The violation was treated by the Court in the *Taylor* case as of no significance. The employer's purpose in the *Murphey* case which was being served was the preservation of morale through recreation and entertainment. The employer's purpose in the *Taylor* case was the training of pilots.

In contrast with the facts relied upon by the majority in the *Taylor* case, the serviceman in the present case had not abandoned or departed from the business of the employer which he had set out to accomplish and for which purpose he had been given the use of an army vehicle, namely, preservation of morale through recreation and entertainment. This difference, under the reasoning of the majority, ought to produce a ruling in favor of scope of employment and government liability.

In precise conformity with the two factors listed as crucial by the dissenting judge in the *Taylor* case, the serviceman in the present case had been put in possession of the army vehicle and was driving it in the line of his duty of the moment—maintenance of morale. This similarity, under the reasoning of the dissenter, ought likewise to produce a ruling in favor of scope of employment and government liability.

The relevance of the Supreme Court's disposition of the *Taylor* case to your petitioner is thus easy to demonstrate. But unless this Court will grant certiorari in this case, the Court's disposition of the *Taylor* case will come too late to afford your petitioner any assistance. On the other hand, the granting of certiorari will provide this Court with an ideal companion case for purposes of comparison with the *Taylor* case, will occasion this Court a minimum of additional inconvenience, and will at the same time assure to your petitioner a just and consistent outcome of her case.

CONCLUSION.

For the reasons stated above, petitioner Althea G. Williams respectfully requests that a petition for certiorari be granted and directed to the Court of Appeals for the Ninth Circuit, to review its decision of September 26, 1957.

Dated, San Francisco, California,
December 20, 1957.

Respectfully submitted,
HENRY C. CLAUSEN,
Attorney for Petitioner.

(Appendix A Follows.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Althea G. Williams, Appellant, vs. United States of America, Appellee.	No. 15,338 Sep. 26, 1957

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: Stephens, Chief Judge and Bone and Chambers, Circuit Judges.

Bone, Circuit Judge.

The instant appeal brings this Tort Claims Act suit here for the second time. See decision of this Court in Williams v. United States, 215 F.2d 800. On certiorari to the Supreme Court, that Court vacated the judgment of this Court and in a brief order (350 U.S. 857) remanded the case "for consideration" in the light of the controlling California doctrine of respondeat superior. Upon this remand the case was further "considered" by the District Court *on the original trial record* upon which that court based its first decision reported in 105 Fed. Supp. at page 208. The District Court rendered a second opinion and decision which is reported in 141 Fed. Supp. at page 851. The present appeal is from the judgment entered on this second decision.

The Basic Facts

From the record certain facts appear to be clearly established. Appellant, an employee of a private construction firm on the Island of Guam, sustained personal injuries when a parked car in which she was sitting was struck by a military vehicle driven by Corporal Seabourn. The accident occurred near a "breakwater" parking spot in Agana, Guam at or about 10:30 p.m. on March 3, 1949. Seabourn had obtained an official pass to leave the Guam army base where he was stationed, this pass covering

(so far as all of the evidence reveals) the entire day and night of March 3, 1949. During the afternoon of that day and while authorized to be away from his army post, Seabourn in the company of two other soldiers (Schmidt and Vincent) engaged in drinking intoxicating beverages.

The three men returned to their army base "unit" about 7 p.m. on that day and while there, Sergeant Stiles, a member of Seabourn's company, handed Seabourn a so-called "trip ticket" for a ¾ ton vehicle known as a "weapons carrier." This ticket had been made out about 8 a.m. of that morning to a driver named Cabera, a soldier who also worked with Seabourn. The "ticket" indicates that on the day in question the vehicle had been requested by a Lt. W. R. Werb, and the *use* of the vehicle was therein authorized for "Official Business." Listed on the ticket are the various points to which the weapons carrier was driven that day. Neither Seabourn's nor Stiles' names appears on the ticket, nor was Seabourn's *use* of the vehicle in any way indicated thereon.

In the army company "unit" or "section" in which Seabourn was serving, a loose practice had prevailed for several months under which servicemen in this unit were able to secure possession of army vehicles to drive for their own pleasure, this being accomplished by these men by informally "passing around" among themselves "trip tickets" which might have been issued to another driver for official army use, in this case the vehicle involved having been assigned to a man named Cabera for the use of Lieutenant Werb on the day of the accident.

Having secured the vehicle that evening by such informal means, Seabourn (in company with Schmidt and Vincent) drove the army vehicle to the Enlisted Men's Club on the Island where they drank beer and champagne after which they decided to "go for a ride." Thereafter, and prior to the accident here involved, and at a rather late hour, Seabourn let his companions out of the army vehicle and "took off" alone. It was during this night drive that the accident occurred at a time when, according to Seabourn's sworn statement, he was driving the vehicle "only for recreation." His two companions made official statements under oath for official records, these statements setting forth many of the above mentioned facts. In the course of this litigation, the recitals in these records, and their later depositions, contained the averment that at the time Seabourn left them to make

his night drive he was "definitely drunk" and "very drunk." Seabourn swore that he remembered nothing that occurred after he left Schmidt and Vincent except that the next morning he awoke alongside the road when the sun was shining.

None of these three men claimed that they were required to execute military orders of any kind, or to perform military duties of any kind while away from their post on March 3, 1949, nor do they attempt to claim that army regulations then in force sanctioned the informal use of army vehicles for the purpose, and under the conditions of use shown by Seabourn's activities on that day and night.

Furthermore, there is absolutely nothing in the record to show that Seabourn's superior military officers had personal knowledge of, or control or supervision over, the use of the vehicle while it was in Seabourn's possession on all of the day and night of March 3, 1949, nor any control over Seabourn's activities after he got the trip ticket from Stiles on that evening and thus used the Cabera ticket which had been issued that morning for the use of Lt. Werb. Nor had any military order been issued by a superior officer directing, authorizing or permitting Seabourn to drive or use the vehicle during that day or night *for any purpose*, military or otherwise (including "recreation"), or for the discharge of any kind of a military order or duty.

Based upon the general facts we outline above, appellant's complaint against the United States under the Tort Claims Act asserted, inter alia, that Seabourn's negligent operation of the vehicle during his night drive *was in the line of his duty for the Government*. The Government's answer, inter alia, denied this assertion.

Preliminarily, it should be made plain that, relying on application of the doctrine of respondeat superior as applied in California (from which Guam law on the subject derives), appellant has at all time strenuously contended (as her basic premise), that "Seabourn was *not acting outside* the scope of his employment" when he crashed his army vehicle into the parked car in which appellant was sitting; that at the time of the crash "the soldier was acting within the course and scope of (his) employment *by seeking entertainment that night*"; that "entertainment" (including driving merely for pleasure) on Guam is essential to a soldier's morale; that morale "is necessary to the maintenance of efficiency in the armed forces there," hence Seabourn's night

drive came within the scope of an "official duty" to himself and the army.

Before reaching appellant's theory of government liability as amplified in her briefs, we emphasize that nothing presented in the record suggests or supports a conclusion of fact or law that on his night drive Seabourn was then in any way *combining* this venture with any sort of "official business" of the army, *unless* the circumstances (a so-called "common practice" in his army company unit) under which he secured the use of the army vehicle for recreation can be said to make this night drive an activity which (as a matter of law) must be held to represent a *combining* of his drive for personal recreation with the discharge of some "official business" for the army. As we have noted above, Seabourn frankly avowed under oath that he was then "driving for recreation"; nowhere in either his affidavit or deposition does he (or any other witness in the case) assert that a superior officer had directed (or given permission to) Seabourn to use the army vehicle for *any purpose* on March 3, 1949, or that he drove it that night *to execute any military orders* in connection with his army duties. In this very material and highly significant respect the facts of this case abruptly part company with the facts of our later noted Murphey case, 179 F.2d 743, where the driver of the army vehicle was acting *under specific direction of a superior officer when he made his night drive*. Yet appellant strenuously argues that *this case is on all fours with the facts of the Murphey case*: that its facts make it fit the facts of the Murphey case "to a T."

We outlined above the basic facts of this case in order to relate them to the specific arguments here advanced by appellant in her briefs since they serve to clearly delineate the legal basis of her claim of government liability under the Tort Claims Act, that is to say, a claim resting squarely on the "recreation-morale" theory as buttressed by the claimed "practice" and/or "policy" in vogue in Seabourn's company unit. These arguments are set out in considerable detail just below.

Appellant's' Position

Appellant urges that: Vehicles were necessary for recreational purposes on Guam due to "distances" on the Island; all officers and enlisted men in Seabourn's unit followed the practice of circulating trip tickets; this unit practice had prevailed for at least fifteen months prior to the accident; this unit practice was a long-

established "army custom" and a standard operating procedure; Seabourn was "engaged *in a series of authorized acts*, namely, driving the vehicle for recreation *to and from* recreational facilities provided by the Government *at the time of the accident*"; "under the peculiar circumstances of Seabourn's overseas service, his night drive was "for a governmental purpose" to wit, "the improvement of (his) morale"; the "improvement of morale," as such, is announced in Murphey v. United States, supra, 179 F. 2d 743 *which was approved by the Supreme Court;* Seabourn *was authorized to use the vehicle for recreation because of the "custom, practice and standard operating procedure" in vogue in Seabourn's unit;* under the "practice" of Seabourn's unit, the same trip ticket "would be passed around from new driver to new driver"; Seabourn's *use* of the vehicle *was authorized specifically* because he secured the trip ticket *"while* [he was] *the official motor pool army dispatcher";* "even assuming that this army custom and practice might have *technically violated some general Army Regulations* still in the eyes of the law *such hypertechnicality should not and does not affect the rights of an injured third person";* therefore "the question of technical violation of Army Regulations is more or less moot," even if (as appellant says she argued before the Supreme Court) "the vehicle was not operated according to the strict terms of (the then) Army Regulations 700-105,[1] still the Government would be liable *because* of the injured third person"; "the violation of an *unenforced and ignored* [in his unit] Army Regulation could not be relied upon by the government to avoid liability, for to do so would permit the government to immunize itself *by the unfair device of*

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[1] "B. Army Regulations 700-105 (30 June 1948) provide in pertinent part:

"26. Use of vehicles.—• • •

"b. Motor vehicles • • • will be operated • • • only if properly dispatched on WD Form 48 (Drivers' Trip Ticket and Preventive Maintenance Service Record), issued by the dispatching motor pool or under such instructions as the appropriate commander under existing authority may direct.

"c. Motor vehicles will be used only for official business, including the special uses listed in paragraph 28.

• • • • •

"28. Special uses.—Motor vehicles, when available without detriment to other official business • • • may be used by special direction of the commanding officer for the following purposes:

"a. Authorized athletics

"b. Transporting personnel, including entertainers and party guests, and supplies and equipment in connection with authorized,

enacting regulations bounding the scope of employment of its servants while at the same time *in practice and in fact authorizing its servants to perform the proscribed acts*"; the (above mentioned) practice "*was itself evidence of authority, of permission, and of the 'scope' of employment for soldiers stationed on Guam at the time of the accident*"; that being (so) *authorized*, "Seabourn's authorized use of the army vehicle for recreation was within the scope of his employment. It does not matter that that use was negligent nor that the use gave him personal enjoyment. Under the peculiar facts and circumstances of this case, a governmental purpose was being served which fixes liability upon the government"—*this under the rule of respondeat superior;* what Seabourn did by his night drive was in keeping with the realities of morale maintenance since this drive was for "recreational purposes"; that "concepts change and it is no longer true, as appellee contends, that the employee at the time of the accident in order to impose liability must be engaged in 'work' or in performance of 'duties'. • • • *It does not matter that Seabourn was not performing his duty as supply clerk or performing any other so-called 'official duties'*"; that "this is not a case where a soldier is on a 'stateside pass' seeking 'stateside' pleasure."—"this is a case like Murphey v. U. S.";—it is a case "*where the servant is combining his own business with that of his master, or attending to both at substantially the same time*," (thus coming within the California rule of Ryan v. Farrell (1929), 208 Cal. 200, 280 Pac. 945); that under the facts of the instant case, Seabourn's "scope of employment is *broadened* to include recreational activities, including driving for recreation" (under *the "specific authorization"* above noted); thus "the doing of *an authorized act* in a wrongful or prohibited manner will not preclude responsibility of the employer • • • the test is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal and while the agent *was still occupying himself* with the principal's business *within the scope*

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organized, and supervised recreational, welfare, and morale building activities.

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"29. Motor pools.— • • •

"d. Vehicles will be dispatched from pools to perform specific tasks, and will not be permanently allocated or assigned to any agency, or individual, except as prescribed herein."

of his added employment," (citing Deevy v. Tassi, (1942) 21 Cal. 2d 109, 125, 130 Pac. 2d 389).

Appellant adds the contention that since Seabourn had been "authorized" to use the vehicle for the purpose of recreation, there is no distinction between entertainment and recreation (or "movies" as in our Murphey case, supra). She also tenders the contention that "*the issue is clearly presented by the evidence whether Seabourn had departed from and resumed his employment* • • • if the Murphey case driver [who drove on instructions from a superior officer] was not on such a departure or frolic as would preclude liability, then neither was Corporal Seabourn."

In short, the argument is that Seabourn was indulging in "recreation" by his drive and this fact made his driving activity "government business" (or at least an activity which *combined* recreation with government business) "within the scope of his employment." And it is finally argued that the Supreme Court "held" in the instant case "that the issue of scope of employment is governed by the California rule of respondeat superior, *not* federal law, decisions *or* [army] *regulations, whether they were enforced or not.*"

Since appellant argues that the Supreme Court actually "held" in the instant case that *Army Regulations*[1] then in force have no application whatever to the peculiar facts and circumstances revealed by the record in this case (a contention that finds no support in the text of its brief order of remand) it is crystal clear that she thinks that this Court is *required* to wholly disregard the existence of such regulations in disposing of this case. (See footnote 3, infra.)

We think that what is set out just above fairly summarizes appellant's position.

So far as we are aware, no federal court has ever held that the Army is not free to adopt and enforce reasonable regulations to govern the use of its vehicles *by* servicemen and officers, or that such regulations can, or must be, wholly disregarded by a court when a use of army vehicles by servicemen, not in compliance with, but in violation of, army regulations, has been accomplished in the irregular manner revealed by the record in this case.[2] While appellant does not challenge the validity of these reg-

[1]Enactment of the Federal Tort Claims Act represented a statutory relinquishment of sovereign immunity from suit for torts

ulations, she apparently construes them as a set of rules drafted with a calculated purpose and design to defeat certain types of tort claims by injured third persons. This seems evident by the arguments in her brief. She urges that "the rights of injured

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of the Government's servants and employees. But we find nothing in that Act which requires us to completely ignore and/or literally abrogate, as utterly meaningless, a pertinent code of Army Regulations which were designed to administratively regulate intramural operations involving and relating to the use of army vehicles by members of the armed forces. It cannot be said that these earlier adopted regulations represent a studied, unreasonable and captious purpose to nullify subsequent suits based on the Tort Claims Act or to deny justice to a plaintiff in peculiar factual situations such as those disclosed by the record before us. For us to adopt appellant's theory would be tantamount to a declaration that the army must stand helpless in the face of open violations of its regulations relating to the use by its members of vehicles employed for only *specifically designated* forms of recreation. In practical effect this would be an unwarranted intrusion by the courts into a legitimate field of army discipline. Certainly nothing in the facts of this case could possibly warrant or justify such judicial action.

While it may be conceded that his pass for that day and night might have been cancelled at any time during this period of time had military authorities required his services, the record reveals that this was not done.

The arguments of appellant invite a word concerning the here present sovereign-soldier relationship and the right of the sovereign to define the boundaries of *that relationship*. Certain it is that such a relationship is not governed by state law—even under the Erie-Tompkins doctrine. A judgment of this Court was affirmed in United States v. Standard Oil Co., 332 U.S. 301, and its decision (pp. 305, 306, 309, 310) the Supreme Court significantly stated that "*perhaps no relation between the Government and a citizen is more distinctively federal in character than between it and members of its armed forces.* To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces *and persons outside them* • • • the scope, nature, legal incidents and consequences of *the relation* between persons in service and the Government *are fundamentally derived from federal sources and governed by federal authority*." (Emphasis supplied.)

So far as we are aware, the Supreme Court has never seen fit to recede from the "relationship" doctrine above noted. Therefore this Court cannot agree that it is free to wholly disregard, or nullify, regulations lawfully promulgated by the army for the purpose of governing the administration of its purely internal operations (such as control of the use of army vehicles by servicemen and officers). And see foot note 3, infra.

third persons are to be governed by the principles of respondeat superior, not by the skill of some legal draftman in the Pentagon, who might, by legal fiction and blind to actualities, so draft or construe administrative regulations as to defeat tort claims by injured third persons. Where authority to do an act is, in fact, granted, *this Court has held in the Murphey case*, and the Supreme Court has gone along with the California doctrine that the Government thereby becomes liable."

Appellant relies heavily on what she now declares to be a precise *holding* of this Court in its Murphey decision. She asserts (p. 7 reply brief) that "this very Court [there] *held*" that—

> "*where permission has been granted as a general custom* to use an army vehicle for recreation, such *practice* fixes liability upon the government and renders groundless the trial court's findings that the soldier was not acting within the scope of his employment, *even though in a particular case there is positive testimony of prohibitive orders.*"[3] (Emphasis is ours.)

An examination of the language of our Murphey decision reveals the absence of any such explicit *holding* therein. We therefore assume that appellant is presently endeavoring to read into this decision a non-existent judicial pronouncement of this Court on the issues in that case.

In summary, appellant's own arguments outlined above, together with facts firmly established by the record, serve to clearly establish to our entire satisfaction the following highly material facts.

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[3]We assume that in referring (in this purported quotation) to "prohibitive orders," appellant is calling attention to the pertinent Army Regulations cited in the Government's brief which sets forth the then applicable Army Regulations. From this citation we conclude that the date of promulgation and/or adoption of these regulations was June 30, 1948. The claim in the instant case arises from an accident occurring in March of 1949. We cannot conclude that these earlier adopted regulations represent a studied purpose of the army to *defeat* later tort claims based on a set of facts here confronting us. We must and do assume that these administrative regulations have the force and effect of law; at no point is it argued that they are out of harmony with any statutory provision or provisions. See Standard Oil Company, etc. v. Johnson, etc., 316 U.S. 481, 483, 484, where the Court held that army regulations "have the force of law" (citing apposite cases in footnote 5 of that opinion).

They are: (1) Seabourn was away from his post on a pass covering all of March 3, 1949, and it is not contended that on this day and at the time of the accident he was executing any order of, or acting under permission of, a superior officer on his drive when the car crash occurred; (2) a *claim* by appellant that at the time of the crash Seabourn was indulging in "officially authorized" recreation; that even though he was no. *then* performing any duty assigned to him by a superior officer, or driving with the permission of such an officer, or driving the vehicle under conditions specifically sanctioned by army regulations, nevertheless Seabourn must be held to have then been engaged in performing "government business," or (under the California rule of respondeat superior) at least *combining* his then private pursuit of recreation with the business of the master; (3 a *claim* of appellant that Seabourn's night ride must be held to have been an "officially authorized" activity *because* of the loose "practice and/or policy" in his "company unit" under which he managed to "check out" the vehicle "while the official motor pool army dispatcher"; (4) the claim of appellant that the loose "practice" in Seabourn's unit of "passing trip tickets around from driver to driver" became translated into an "officially sanctioned use" *because* the late drive (even though Seabourn was very drunk and certainly in no condition to execute any sort of order) was, in any event, a legitimate and officially sanctioned means of sustaining his "morale," thus making it come within the line of his duty to the Government.

The Record of Depositions and Statements

On March 7, 1949, the soldier Seabourn executed and signed an affidavit before a person qualified to take acknowledgments, and this document became and remained a part of the official army record which was before this Court and the lower court. It is Seabourn's own recital of facts made shortly after the accident. Later, and in San Francisco, California, Seabourn made and signed a deposition which was also part of the record before this and the lower court. We have carefully read both of these Seabourn documents and also the sworn statements and/or depositions of his fellow soldiers Schmidt and Vincent who were with Seabourn during a part of the day and the earlier part of the evening of March 3, 1949. As stated by Schmidt, Seabourn's soldier friend, "That's about all we did, drinking and running around." And this statement about sums up what these three

young men did after Seabourn secured the army vehicle and up to the time when Seabourn, then very drunk, "took off" alone for his night drive.

It would unduly burden this opinion to quote at length from these several documents; it is sufficient to say that the averments therein do not part company in any here material way with the basic facts established in the record before us. Upon these facts appellant seeks to impose vicarious liability on the United States.

The Government's Position

Appellee says that the question before us is whether the trial court, in light of the applicable California rule of respondeat superior, correctly held that the Federal Government was not liable for injuries caused by a serviceman who, while off duty and on a pass, obtained unauthorized use of a military vehicle and went joy riding in it.

The Government rejects as unsound appellant's argument that pertinent army regulations are in no way applicable to Seabourn's entertainment activities at the time of the accident. It asserts generally that "recreation" of the peculiar character here shown can hardly be termed an aid to the maintenance or improvement of the efficiency of troops; that even if it be assumed that in Seabourn's particular unit it had become a practice for military vehicles to be "passed on" from one serviceman to another and surreptitiously used (despite the official nature of a trip ticket) for off-post individual recreation, that sort of casual practice in plain contravention of applicable Army Regulations cannot transform Seabourn's drunken frolic *into a recreational activity within the scope of his employment*, since such a frolic obviously served no governmental purpose or interest and cannot be viewed as coming within the employee's "scope of employment" under California law.

The government also argues that since pertinent Army Regulations *forbade* any "practice" by servicemen of passing army vehicles around and using them as Seabourn did here, his night drive was clearly unauthorized and was not made for the benefit of the service. In short, an irregular custom or practice in his unit of violating army regulations for personal ends would not justify a holding by this Court that he was acting within the scope of his employment when he injured appellee, this for the reason, and upon the *assumption* that Seabourn's peculiar night

drive would *improve and not impair* his efficiency and would increase his work output, with a resulting *benefit* to his employer.

The Government emphasizes that in arguments to support her case, appellant has (1) consistently *assumed* that the record requires a finding of a custom or practice in Seabourn's unit which legally justified servicemen's use of military vehicles issued to others for official use, this for their individual recreational purposes, and (2) she urged that this practice is *enough* (despite Army Regulations) to *demonstrate* that Seabourn was acting within the scope of his employment. It was pointed out by the Government that both the lower court and this Court *found* that no responsible army official had authorized Seabourn's use of the vehicle. In other words, the Government says that appellant would have us bridge an impassable chasm with an *assumption* of fact and law not justified by the record.

The Government further contends (and we agree) that the record fully discloses and establishes that on his night drive Seabourn was away from his post on a pass and then free from any disclosed military duty, and that no superior army officer countenanced, or even knew about, Seabourn's night use of the vehicle, or had any sort of control over this use.

The Cases

In light of the fact situation we have discussed, the problem to be resolved is the application of the California doctrine of respondeat superior so far as several pertinent decisions reveal it.

In considering these decisions we have noted the application of this orthodox doctrine in federal cases and in state court decisions in situations where the court did not part company with the basic principles announced in the California cases. Both parties have cited and relied upon such cases.

We think that there has been no basic change in the California law of "scope of employment" since the date of our earlier opinion in this case (215 F.2d 800). In considering the opinions cited by the parties we do not lose sight of the fact that the armed services (like private employers) are concerned with the morale of, and recreation for, servicemen. A sound recreational program (envisioned in the army regulations) improves employees' morale and efficiency, enables them to maintain work at a higher level, and thus indirectly benefits the employer's busi-

ness. And it may be conceded that on an isolated island like Guam there may be even greater need for employer-organized and employer-supervised recreational activities than in the continental United States. Even so, such army "recreational activities" come within the sweep of army regulations.

Our Murphey decision (179 F.2d 743) heavily relied on by appellant, holds nothing more, in substance, than that the driver of any army truck, *acting pursuant to specific official orders* in carrying (transporting) in an army vehicle an organized group of soldiers into town *for a specified recreational activity*, is within the scope of his employment even though the accident happened about two or three blocks *off his prescribed route*. In that case we were also dealing with an isolated army post.

One need not examine a multitude of cases to justify application of the basic and universally accepted rule in our jurisprudence that a pre-condition for application of the respondeat superior doctrine is that the employer becomes vicariously liable *only* when the servant, at the time of the accident, is "conducting the master's affairs," United States v. Eleazer, 177 F.2d 914, 916, 4 Cir. Or as Judge Cardozo expressed it in Fiocco v. Carver, 234 N.Y. 219, 223, 137 N.E. 309, 311, the dominant purpose * * * must be proved to be the performance of the master's business." In no material respect does California jurisprudence part company with, or fail to recognize, that the touchstone for respondeat superior liability is the furtherance of the master's business at the time of the accident.

It is crystal clear that in this case Seabourn was "off duty" on all of March 3, 1949 on a pass, and was not executing any order of his superior officers at the time of the accident. To surmount the difficulty created by this fact situation, appellant has adopted a theory under which she claims that his "off duty" night drive must (as a matter of law) be regarded by us as within his line of duty *because* it was an "authorized recreational activity" of a character which *automatically* brought it within the scope of his military employment. This so-called "authorization" is claimed to arise from the "common practice" (or "policy") in vogue in his army unit which made it possible for servicemen in that unit to secure and use army vehicles *for their own amusement*. At no point in arguing her theory does appellant attempt to justify Seabourn's use of the vehicle by reference to, or reliance upon, the then applicable Army Regula-

tions we have cited.[1] Under her theory, they must go out of the case because they have no application to the peculiar facts of this case.

In attempting to tie the facts of this case to the facts we detailed in our first Williams opinion, appellant has obviously overlooked the exact language we used in that first opinion. On page 9 of her reply brief she argues that in this earlier opinion *we said "that Seabourn was actually indulging in an authorized and permissible form of 'recreation' at the time he crashed his Army vehicle into appellant's car."* (Emphasis is ours.) This quotation is inaccurate and misleading. In that part of the opinion (215 F.2d 800) from which this purported quotation was lifted, we were then discussing *appellant's theory* of Government liability. In a specific reference to *her theory* of the case we said (p. 808):

> "In stating her position on the issues, appellant asserts that since (under Army Regulations) a soldier may indulge in 'recreation', his 'off duty' recreational activities are properly to be regarded as within the scope of his 'military duty.' The assumption necessarily underlying this contention is that Seabourn *was actually indulging in an authorized and permissible form of 'recreation'* at the time he crashed his army vehicle into appellant's car. Upon no other basis can her position be sustained * * *."

To this comment we added the further comment that "upon no other basis can her position be sustained unless we close our eyes and agree that a loose post 'practice' of 'passing around' trip tickets issued only for *official use*, (when the actual use is not for official business) in some undisclosed way transformed the use by Seabourn into an authorized 'official use.'" (Emphasis ours.) And we also emphasized *at that point* that enlisted men's use of the vehicles "for joy riding and drinking bouts, all without the knowledge or approval of their superior officers, finds no sanction in applicable Army Regulations, but to the contrary, is a clear violation of these rules."

In short, this Court did not say what appellant now says was stated in our first Williams opinion upon which she relies.

Appellant failed to cite three pertinent California cases which were discussed at some length in the lower court's second opinion (141 Fed. Supp. 851) and here relied upon by appellee. In Kish

v. California State Automobile Assn., 190 Cal. 246, 248, 212 Pac. 27, the California Supreme Court refused to impose a respondeat superior liability where the employee at the time of the accident was not in performance of any act connected with the business of his employer *but had finished his work for the day and was "off duty" and on his way down town for supper.*

In Lee v. Nathan, 67 Cal. App. 111, 226 Pac. 970, the California court held that there could be no respondeat superior liability *where the employee was driving the employer's vehicle after duty hours* while pursuing his own ends *despite the fact that the injuries to the plaintiff could not have been committed without the facilities so afforded to the employee.*

And in Slater v. Friedman, 62 Cal. App. 668, 672, 217 Pac. 795, 796, the court reiterated the rule that where the servant's *"act is done while the servant is at liberty from service and pursuing his own ends exclusively,* there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed *without the facilities afforded to the servant by his relation to his master."* (Emphasis in this reference to the three California cases is ours.)

And see comments of the court in such California cases as Stephenson v. Southern Pacific Co., 93 Cal. 558, 29 Pac. 234; Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 Pac. 697; Duff v. Schaefer Ambulance Service, 132 Cal. App. 2d 655, 283 Pac. 2nd 91; Gousse v. Lowe, 41 Cal. App. 715, 183 Pac. 295. These cases discuss issues pertinent to the issues presented in the instant case.

Only a short time ago, this Court in Pacific Freight Lines v. United States, 239 F.2d 191 emphasized that California law does not impose a respondeat superior liability unless at the time of the accident the employee of the Government was actively engaged in furthering his employer's business rather than his own personal ends. This was a Federal Tort Claims Act suit arising out of an accident involving a military vehicle being driven by a serviceman who had previously been *directed* to drive the car by a superior officer. In that case the principal question was whether, at the time of the accident, the serviceman was acting within the scope of his employment under California law. (See p. 193 of opinion.) In the opinion in Pacific Freight we cited the case of Loper v. Morrison, 1944, 23 Cal. 2d 600, 605, 606, 145

Pac. 2d 1, 3-4. There, and in an "in bank" hearing, the California Supreme Court carefully pointed out the relevant circumstances and factors to be considered and weighed in relation to one another in appraising "scope of employment" cases in California. One of these "factors" was "the incidental acts that the employer should reasonably have expected would be done." Our decision in the Pacific Freight case exonerated the Government.

In light of the fact that Seabourn secured possession and use of the army vehicle in violation of applicable army regulations dealing with use of vehicles for recreational purposes, can it be said that (under California law) the superior officers of his army unit should "reasonably have expected" him to wilfully violate these army rules in the manner he did, thereafter get "very drunk" and go on a wild night drive merely to entertain himself? We think not.

Appellant urges that *the important fact* which distinguishes our Pacific Freight case, supra, and the California cases cited by appellee is that in the case at bar, as in the Murphey and (later noted) Boynton cases, "the employee was *authorized* for the benefit of the employer to engage in recreational activities. Deviations in route, as in the Pacific Freight case, are not important. *Here the scope of employment by virtue of the authorization to use the vehicle for recreation, becomes broadened so as to include acts done pursuant to such authorization.*" Thus appellant asserts that there was a "broadened authorization" for Seabourn's use of the vehicle for his night ride recreation. But the truth is that no such "broadened authorization" can be found in any language in the Army Regulations; in fact, appellant is compelled, not only to completely repudiate these regulations, but also to justify a loose practice of flouting them in order to sustain this particular claim. This theory of a "broadened authorization" is novel. It seems to rest upon the assumption that, under and by virtue of the "practice" employed in Seabourn's unit, these "trip tickets" must be regarded by us as something akin to negotiable warehouse receipts or certificates, the free and unlimited use of which was legally justified.

The short of it is that the alchemy of legal argument cannot transmute a clear violation of applicable and controlling regulations by servicemen into a principle of law which we must arbitrarily and artificially apply to create government liability. For us to pursue such a course would amount to a holding that

the Army had no legal right to define, by suitable regulations, the proper use of its vehicles.

Appellant's counsel calls upon us to consider the injury of one who was wholly innocent of wrong doing. Seabourn's vicious conduct is so serious a crime under California law (Calif. Penal Code, Section 367(e))[4] that the offense could be punished by fine, and by imprisonment in the state penitentiary up to five years. However appealing, it is beyond our power to substitute sympathy for a proper application of the rule of respondeat superior under California law.

We made reference above to the California Boynton case (reported in 139 C.A. 2d 777, 294 Pac. 2d 733) which is here strongly relied on as authority sustaining appellant's theory of tort liability. The facts of that case are detailed by the court and in the margin we note these facts and pertinent holdings of the court.[5]

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[4]"§367(e) Any person operating or driving an automobile, motor cycle or other motor vehicle who becomes or is intoxicated while so engaged in operating or driving such automobile, motor cycle or other motor vehicle, and who by reason of such intoxication does any act, or neglects any duty imposed by law, which act or neglect of duty causes the death of, or bodily injury to, any person, shall be punishable by imprisonment in the state's prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding $500 or by both such fine and imprisonment."

[5]Boynton, a minor, was struck by a car driven by Brooks, an employee of McKales. Brooks was then returning to his home from a banquet given by McKales to its senior employees. Judgment on a jury verdict was for Boynton who was injured when standing at night next to his parked car. Brooks had been formally "invited" to a banquet given by his employer. The California court pointed out (p. 790) that (as to conflicting inferences to be drawn from the evidence) "the only decisive question [for the jury] is therefore whether the character of the banquet and the employer's relation to it were such that Brooks' attendance could be reasonably considered within the scope of his employment." The court added that while there was testimony that there was no "compulsion to attend" the banquet, there was a permissible inference from the evidence that "it was an official company function with close relation to its sales program and intended to benefit the company by increase in the continuity of employment the attendance at which was at least expected from the employees."

In applying the rule of respondeat superior the court noted McKales' argument that no recovery could be had *because* the

In its decision in the Loper case, supra at 606, the court said: "Under the circumstances of this case we cannot hold as a matter of law that Morrison's [the employee] trip to the tavern and to Dolan's home constituted an abandonment of his employer's business. • • • *it was within Morrison's authority to collect accounts* [after his regular hours of work] *at the time the accident occurred.* The employer's liability was not necessarily termi-

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dinner was only "a social affair" which Brooks attended for his own pleasure without direct or indirect compulsion from his employer; that for this reason the evidence was insufficient to bring the case within the exception to the "going and coming rule" known as the "special errand rule."

As to the so-called "special errand rule," the court said that "if the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, *but is coming from his home or returning to it on a special errand either as part of his regular duties or at a specific order or request of his employer,* the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons. (Citing cases) *To such special missions the general test as to scope of employment applies.* It is not necessary that the servant is directly engaged in the duties which he was employed to perform, but included are also *missions which incidentally or indirectly contribute to the service, incidentally or indirectly benefit the employer.*" (Citing among other cases, Kish v. California State Auto Assn., supra.)

The court also said: "The attendance at a social function, although not forming part of the normal duties of the employee, may come under the 'special errand rule' *if* the function or the attendance was connected with the employment and for a material part intended to benefit the employer who requested or expected the employee to attend." And further: "*If the employee is within the scope of his employment* when he inflicts injuries, the fact that the automobile which caused the injury belonged to the employee will not relieve the employer from liability *if* the employee's use of his car was with the express or implied consent of the employer." (Citing cases including the case of Ryan v. Farrell, supra.) (Emphasis supplied.)

Again we come face to face with the question whether Seabourn was on any sort of "mission" *for* his employer when he injured appellant, and whether his wild drive "incidentally or indirectly" benefited his employer. To agree with appellant's theory would compel us to hold that (under California law) Seabourn's drunk drive for his own recreation somehow and in some wholly undisclosed manner conferred some direct or indirect benefit on the United States, a conclusion repudiated by the clear facts of this case.

nated by reason of the fact that Morrison *combined* a private purpose of his own with the business of his employer [citing Ryan v. Farrell, supra]. 'It is the established rule in this jurisdiction that where the servant is *combining* his own business with that of the master, *or attending to both at substantially the same time*, no nice inquiry will be made as to *which business* the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master.'" (Emphasis supplied.)

In considering the California rule announced in the Loper case, and under the peculiar circumstances of this case, we again run afoul of the official army regulations which are binding on *all* army personnel when using army vehicles for recreational purposes. No order came to Seabourn authorizing him to use the vehicle *for any purpose*. His use was surreptitious and a clean-cut violation of the regulations, and for us to insist that such illegal use was "reasonably to be expected" (or was deliberately sanctioned) by army officials would not be justified. Oddly enough, the *practice* (under army regulations) of permitting certain designated *forms of recreation* for army personnel is advanced by appellant to bolster her claim (under a California case) that in any event Seabourn was somehow *combining* his night drive with official army business at the time of the accident, this without any evidence of such "army business" and in the face of his sworn statement that he was then driving *only* "for recreation." This Court is not unmindful of the injury inflicted on appellant but under the evidence we cannot regard Seabourn's wild night drive as anything other than a senseless and irrational act wholly unconnected with, and not serving or benefiting any business of his employer. For us to reach any other conclusion would do violence to clearly established facts.

Our decision in United States v. Johnson, 181 F.2d 577, is cited and relied upon by appellant. In appraising the facts we sustained a *finding* of the lower court that Moore, the (Navy) driver of a vehicle (also on Guam) was acting within the scope of his employment when the injury to Johnson occurred. Moore was attached to a navy service depot and had duties to perform at the Dispensary. On the day of the accident he had been *required* to execute a duty (in and as a part of his course of employment) *to deliver his report* to the Dispensary. An agreed

"statement" in evidence indicated that Moore went on a number of other "errands" *before* he got around to taking his report to the Dispensary. Moore finally started to drive toward the Dispensary; for some undisclosed reason, the car started to "shimmy" and the car turned over injuring Johnson who asserted that the facts brought the case within the rule of res ipsa loquitur.

In seeking to apply in the Johnson case what we regarded as California doctrine to the facts, we cited Waack v. Maxwell Hardware Co., 210 Cal. 636, 292 Pac. 966, where the court held that the question was whether at the time and place of the accident the driver *had resumed his employment* in his master's business *after* one or more deviations for purposes not related to his master's business. The lower court had held that *whether there had been such a resumption of the master's business was a question of fact for the jury.*

In our Johnson opinion we also made reference to the above cited California case of Ryan v. Farrell. We there said: "The fragmentary record here contains no direct evidence as to the circumstances under which the motor vehicle was entrusted to Moore, *or* the use he was permitted to make of it. But since it appears that the vehicle belonged to the government, and that Moore was in the government's employ, the inference is permissible that *Moore was authorized to drive the vehicle in performing his duty of delivering the report.*" (Emphasis supplied.) But we added that under the rule of the Waack's case, supra, the trial judge was justified in *finding* that Moore had *resumed his employment* at the time the accident occurred, and was *then* acting within the scope of his employment, which on this occasion was the delivery of a report.

As we later note, the trial judge in the instant case made findings repudiating appellant's theory of "scope of employment."

Another case relied on by appellant is Carr v. Wm. C. Crowell Co., (1946) 28 Cal. 2d 652, 171 P. 2d 5. The recital of facts therein reveals that Enloe, one of Crowell's employees, engaged in a wordy exchange with Carr, an employee of a sub-contractor on the building then being constructed by Crowell. Enloe threw a hammer at Carr, seriously injuring him. Carr brought action against Enloe and Crowell for damages. The trial court directed a (jury) verdict for Crowell but sustained a verdict entered against Enloe.

The holding of the California Supreme Court (reversing the judgment in favor of Crowell) was concisely stated as follows: "It is settled that an employer is liable for wilful and malicious torts of his employee committed in the scope of his employment." In reversing the directed verdict in favor of Crowell, the Court said: "It is sufficient, however, if the injury resulted from a *dispute arising out of the employment.* Under the provisions of section 2338 of the Civil Code a principal is liable for 'wrongful acts' of his agent committed 'in and as a part of' the principal's business. 'It is not necessary that *the assault* should have been made "as a means, or for the purpose of performing the work he (the employee) was employed to do."'" (Emphasis supplied.)

As bearing on the issue arising out of the particular fact situation in the Carr case, the court there cited a California case holding that a grocery store manager was acting within the scope of his employment when *he quarreled* with a customer over an order and injured the customer after an exchange of opprobrious names.

Another California case was there cited wherein the court held that an employee whose duties were to collect power bills, was acting in the scope of his employment when he struck a customer *in the course of a dispute* as to whether the customer had received a notice that his electric service would be discontinued if he did not pay his bill. The holding was there based on the ground that every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while acting in the scope of their (employees) duties.

The court commented that the evidence in the Carr case indicates without conflict that the injury to Carr was an outgrowth of Enloe's employment—that *the altercation* arose *solely over the performance of Enloe's duties,* and his entire association with Carr arose out of his employment by Crowell.

As applied to the situation in the Seabourn case, we face the fact that at the time he injured appellant, he was not engaged in an altercation with appellant, nor was he engaged in performing any duty or duties directly or indirectly associated with normal and regular army activities. As a matter of fact, the very purpose and function of his "pass" was to completely free him from the necessity of performing any regular and/or routine

army duties (work for his employer) during the entire time covered by the pass permitting him to remain away from his army post.[6]

After argument, counsel for appellant called our attention to Rayonier Incorporated v. United States, 352 U.S. 315, 77 S. Ct. 374, and Indian Towing Company v. United States, 350 U.S. 61. We cannot agree that the holdings in these cases require us to reach conclusions different from those expressed above.

We find no rational basis for disagreeing with the conclusions twice expressed in the opinions and decisions of the able and experienced trial judge in the instant case. In his decision now on appeal, he properly found as facts that "the evidence shows that Seabourn was on a frolic of his own, free to find entertainment wherever his own proclivities and desires might lead him" --and further, "Seabourn was neither 'directly nor indirectly serving his master' within the scope of his employment, because he was serving only his *own personal desires* not at all connected with any recreational activities authorized by his employer."

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[6]That Seabourn was away from his army post on a pass and free of any military duty at the time he injured appellant, is not disputed. His then *relationship* to the Government while on this pass or off-duty status "was not analogous to that of a soldier injured while performing duties under orders." Feres v. United States, 340 U.S. 135, 146. And the Court there added that "without exception, the *relationship* of military personnel to the Government has been governed exclusively by federal law." (Emphasis supplied.)

A soldier who is off duty or on a pass is not engaged in the business of the United States. While on pass or leave, one in military service "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him." United States v. Williamson, 90 U.S. 411, 415. (We assume that at any time during leave on a pass, a member of the army could be recalled for military duty.)

And see Hunt v. United States, 38 C. Cls. 704, 710, and Foster v. United States, 43 C. Cls. 170, 175, where the purport of the court's holdings was that a "leave" from service duties is for the sole accommodation of the recipient of the leave privilege; that when a soldier receives a furlough he is for the time being his own master and the master of his time, *and is free to go where he pleases, and do what he pleases, owing no military duty to the Government.*

In our view these findings of fact represent the only logical conclusions that could possibly be drawn from all of the pertinent facts in evidence. In no respect are they erroneous.

Since we are in full agreement with the lower court's disposition of the issues in this case, its judgment here on appeal must be, and is, affirmed.

(Endorsed:) Opinion. Filed Sept. 26, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Althea G. Williams, Appellant, vs. United States of America, Appellee.	No. 15,338

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment. Filed and entered September 26, 1957. Paul P. O'Brien, Clerk.